Nos. 05-35569, 05-35570 & 05-35646

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL WILDLIFE FEDERATION, et al., Plaintiffs-Appellees,
and
STATE OF OREGON, Plaintiff-Intervernor-Appellee

v.

NATIONAL MARINE FISHERIES SERVICE, et al., Defendants-Appellants
and
BPA CUSTOMER GROUP, Defendant-Intervenor-Appellant
and
STATE OF IDAHO, Defendant-Intervenor-Appellant
and
FRANKLIN COUNTY FARM BUREAU FEDERATION, et al., Defendant-Intervenors-Appellees

Appeals of Nos. CV 01-00640-RE (Lead Case) & CV 05-00023-RE (Consolidated Cases) from the United States District Court of Oregon (Portland)

BRIEF FOR APPELLANT STATE OF IDAHO

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STATEMENT OF JURISDICTION

The district court possesses jurisdiction over the proceeding below under 16 U.S.C. § 1540(g) and 28 U.S.C. § 1331. It issued an opinion and order on June 10, 2005, granting in part and denying in part a motion for preliminary injunction. CR 1015 (ER 560).[1] Three parties filed preliminary injunction appeals with respect to the opinion and order to the extent that it granted injunctive relief: Intervenor-Defendant BPA Customer Group on June 13, 2005 (CR 1016); Federal Defendants National Marine Fisheries Service *et al.* on June 15, 2005 (CR 1020) (ER 571); and Intervenor-Defendant State of Idaho on June 17, 2005 (CR 1028). These appeals have been consolidated. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

1. Whether the district court exceeded the scope of its authority under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and the Endangered Species Act, 16 U.S.C. §§ 1531-1544, by substituting its judgment for Appellant National Marine Fisheries Service's determination concerning the appropriateness of summer spill at four dams on the Columbia and Snake

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[1] References to the "CR" are to the district court docket entry number. References to the "ER" are to the Federal Appellants' Excerpts of Record. References to the "AR" are to the administrative record filed below with respect to the 2004 biological opinion.

Rivers and by directing Appellant United States Army Corps of Engineers to provide such spill.

2. Whether the district court erred in concluding that the 2004 biological opinion concerned with operation of the Federal Columbia River Power System failed to comply with the requirements of the Endangered Species Act because Appellant National Marine Fisheries Service:

(a) failed to make its jeopardy finding under 16 U.S.C. § 1536(a)(2) on the basis of the combined impact of the "effects of the action" and the "environmental baseline;"

(b) failed to include within the "effects of the action" the impact of certain "nondiscretionary" actions related to operation of the Federal Columbia River Power System and thereby improperly "disaggregated" the proposed agency action;

(c) failed to consider independently whether the proposed agency action would appreciably reduce the likelihood of the affected species' recovery; and

(d) arbitrarily or capriciously determined that the proposed agency action would not adversely modify the critical habitat of three evolutionarily significant units of salmon.

STATEMENT OF THE CASE

This action commenced in 2001 by the National Wildlife Federation *et al.* (collectively NWF) as a challenge to a biological opinion issued under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544, by National Marine Fisheries Service (NMFS or NOAA) in December 2000. CR 1, 24. The biological opinion was directed to operation of the Federal Columbia River Power System (FCRPS) and certain Bureau of Reclamation (BOR) projects in the States of Montana and Washington. The district court determined in May 2003 that the biological opinion was inconsistent with the ESA in two respects and remanded the matter to NMFS. Nat'l Wildlife Fed'n v. NMFS, 254 F. Supp. 2d 1196 (D. Or. 2003) (NWF) (CR 396). Following reconsultation with the affected Action Agencies—BOR, Bonneville Power Administration (BPA), and United States Army Corps of Engineers (Corps)—NMFS issued a new biological opinion in November 2004. NWF filed a second supplemental complaint in December 2004 against NMFS challenging the 2004 biological opinion under the ESA. The parties thereafter submitted cross-motions for summary judgment, with the district court granting NWF's and Intervenor-Plaintiff State of Oregon's motions on May 26, 2005. CR 986 (ER 325). The court did not vacate, and to date has not vacated, the 2004 biological opinion.

While the cross-motions were being briefed, NWF filed a third supplemental complaint (CR 833 (ER 1)) naming the action agencies as defendants and a motion for preliminary injunction or, alternatively, for permanent injunction (CR 834). The motion sought several types of relief against the Federal Defendants related in part to the summer 2005 migration of juvenile Snake River fall Chinook, an evolutionarily significant unit (ESU) of salmon listed under the ESA. On June 10, 2005 following oral argument, the district court entered a preliminary injunction granting NWF's motion in part. CR 1015 (ER 560).

The injunction directed the Corps to provide "spill" 24 hours per day at (1) four FCRPS dams on the lower Snake River between June 20 and August 31, 2005 to the extent available flows exceed station service requirements and (2) at a Columbia River hydroelectric facility, McNary Dam, between July 1 and August 31, 2005 to the extent available flows exceed 50,000 cubic feet per second (cfs). No spill at three of the Snake River dams or McNary Dam would have occurred under the Action Agencies' operational plan adopted in conformance with the 2004 biological opinion. The court invalidated in the accompanying opinion the Corps' Record of Consultation and Statement of Decision (ROD) and BOR's Decision Document that had adopted the updated proposed action (UPA) analyzed in the biological opinion and that, in the

district court's view, "embraced the same fundamental flaws" of the opinion. CR 1015 at 6-7 (ER 565-66). The Federal Defendants, Intervenor-Defendant BPA Customer Group (BPACG) and Intervenor-Defendant State of Idaho have appealed from the preliminary injunction grant. CR 1016; CR 1020 (571); CR 1028.[2]

STATEMENT OF THE FACTS

Because the district court's injunction order relied on its summary judgment ruling with respect to the validity of the 2004 biological opinion for purposes of determining whether the anticipated summer spill protocols would violate the ESA, review of the biological opinion and the ruling is necessary. The facts relevant to the injunction itself and the court's legal analysis then are discussed.

I. THE 2004 BIOLOGICAL OPINION AND SUMMARY JUDGMENT DECISION

A. The 2004 Biological Opinion: Background and Section 7(a)(2) Analysis

The 2004 biological opinion is the sixth biological opinion issued by NMFS over a 12-year period addressing the operation of the FCRPS with respect to listed salmonid ESUs. Excluding the 1994 opinion, all have been

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[2] The Federal Defendants and BPACG sought an emergency stay from this Court in connection with their appeals. The Motions Panel denied the stay requests by order dated June 21, 2005.

challenged judicially.[3] Each prior opinion has differed from its predecessor in material ways. E.g., American Rivers, slip op. at 12 (NMFS "substantially modified its jeopardy standard" in response to earlier decision and following consultation with other entities and consideration of intervening report). The 2004 biological opinion follows suit and differs most importantly from the 2000 biological opinion by finding no jeopardy and employing revised analyses under section 7(a)(2), 16 U.S.C. § 1536(a)(2), in making that determination. A description of the 2000 jeopardy analysis and the district court's May 2003 decision helps place the 2004 biological opinion's analysis in perspective.

1. 2000 Biological Opinion's Jeopardy Analysis

The jeopardy determination concerning the FCRPS' operation in the 2000 biological opinion derived from a quantitative analysis concerning, most

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[3] Pac. N.W. Generating Co-op. v. Brown, 822 F. Supp. 1479 (D. Or. 1993) (declining to reach, *inter alia*, merits of claim that ITS in 1992 opinion improperly conditioned on providing flow augmentation), aff'd, 38 F.3d 1058 (9th Cir. 1994); Idaho Fish & Game Dep't v. NMFS, 850 F. Supp. 886 (D. Or. 1994) (invalidating 1993 biological opinion for applying incorrect jeopardy standard and inadequately explaining analytical assumptions), vacated on mootness grounds, 56 F.3d 1071 (9th Cir. 1995) (relying on issuance of 1995 biological opinion as mooting challenge to 1993 biological opinion); American Rivers v. NMFS, No. 96-384-MA (D. Or. Apr. 3, 1997) (upholding 1995 biological opinion) (American Rivers), aff'd, No. 97-36159 (9th Cir. Mar. 8, 1999); NWF, 254 F. Supp. 2d at 1212-15 (invalidating 2004 Biological opinion because of improperly defined "action area" and inclusion in RPA of (a) federal actions over which consultation had not taken place and (b) non-federal action not reasonably certain to occur).

importantly, the effects of hydrosystem and harvest factors and a qualitative assessment concerning the effects of habitat and hatchery factors. AR B.156 at 6-9 – 6-11; see, e.g., id. at App. A-30 (Table A-8). In making these assessments, NMFS employed a survival "metric" of absolute extinction, defined as a five or less percent risk of no more than one fish per generation returning within the next 100 years (id. at 1-13, App. A-1, A-2 (Table A-1)), and a recovery metric, defined by specific abundance amounts for all or part of five ESUs and, as to the remaining ESUs or spawning aggregations, "the level of improvement needed in the productivity of the population to result in a median population growth rate (lambda) greater than 1.0 over the next 48 years" until spawning aggregation-specific abundance goals could be established (id. at 1-14; see also id. at App. A-1 & Table A-1). The agency concluded, after consideration of direct, indirect, and cumulative effects that improvements other than those in the proposed action were necessary for eight of the 12 ESUs to meet an overall jeopardy standard of a high likelihood of survival and a moderate-to-high likelihood of recovery. Id. at 1-12, 6-137 – 6-141 (Table 6.3-12), 8-3, 8-5, 8-7, 8-13, 8-15, 8-17, 8-23, 8-25.

NMFS therefore formulated a reasonable and prudent alternative (RPA) consisting of 199 elements, three-quarters of which were directed to hydroelectric facilities (AR B.156 at 9-53 – 9-133) and the remainder to the

other "Hs"—habitat, hatcheries, and harvest (id. at 9-135 – 9-143, 9-145 – 9-151, 9-153)—or research and monitoring activities (id. at 9-162 – 9-182). Critically, however, the suggested RPA was not intended to be implemented in isolation but, rather, in conjunction with the Basinwide Salmon Recovery Strategy (BSRS)—a recovery planning document released simultaneously with the biological opinion by the "Federal Caucus," a group of nine federal agencies that included NMFS and BOR, the Army Corps of Engineers (Corps) and Bonneville Power Administration (BPA). See AR B.78 at 11; AR B.156 at 9-1. The BSRS contemplated not only salmon-mitigation activities by the latter three Action Agencies encompassed within the RPA but also future federal actions, most importantly the Interior Columbia Basin Ecosystem Management Project, that were outside the 2000 biological opinion consultation and had not undergone independent section 7(a)(2) consultation. AR B.78 at 47 & Vol. II at 19.

In reviewing the 2000 opinion's legal adequacy, the district court cited several statements in chapter 9 of the opinion to support the conclusion that NMFS had relied on future, non-consulted federal actions in reaching its determination that the suggested RPA would avoid jeopardy. NWF, 254 F. Supp. 2d at 1214-15. The court found such reliance improper because future federal, non-consulted actions are neither part of the "effects of the

action" nor included within the "environmental baseline" as defined under the Services' regulations. Id.; see 50 C.F.R. § 402.02. It further held that the NMFS improperly relied on non-federal actions as "cumulative effects" that were not reasonably certain to occur. 254 F. Supp. 2d at 1214. The Court therefore remanded "to give NOAA the opportunity to consult with interested parties to insure that only those range-wide off-site federal mitigation actions which have undergone section 7 consultation, and range-wide off-site non-federal mitigation actions that are reasonably certain to occur, are considered in the determination whether any of the 12 salmon ESUs will be jeopardized by continued FCRPS operations." Id. at 1215.

This district court's decision had several consequences. First, and most obviously, it eliminated any flexibility to include the expected impacts from a long-term Columbia River Basin recovery strategy, like the BSRS, as part of a section 7(a)(2) determination. Second, the decision left little choice for the Action Agencies other than to formulate a revised proposed action corresponding to the 2000 biological opinion's RPA—which they previously had adopted as their action—as it might be modified in light of intervening circumstances and further technical analysis during the remand. The decision thus dictated, as a practical matter, that either a no-jeopardy opinion or a jeopardy opinion with no RPA would issue. The Action Agencies' only

recourse in the latter situation would have been to seek an exemption under ESA section 7(g), 16 U.S.C. § 1536(g), from the Endangered Species Committee. Finally, the decision made use of long-term survival and recovery metrics problematic because of the limitation on NMFS' ability to rely on projected effects from future federal and non-federal activities.

2. 2004 Biological Opinion's Jeopardy and Adverse Modification Analysis

The Action Agencies, as anticipated, submitted on remand an updated proposed action (UPA or proposed action) that paralleled in large measure the RPA included in the 2000 biological opinion. AR C.289 at 1 (final updated proposed action); see also AR C.213 at 7-39 ("crosswalk" table showing treatment of RPA items in draft UPA). NMFS also concluded that, in view of this Court's decision, analytical-framework revisions for purposes of the section 7(a)(2) determination were necessary. AR A.1 at 1-5 (ER 598).

The principal modifications involved (1) elimination of the survival and recovery "metrics" used in the 2000 opinion to determine whether the suggested RPA would avoid jeopardy and (2) development of a "reference operation" as an environmental baseline component against which the UPA could be measured to determine whether the proposed action would reduce the likelihood of both survival and recovery for any ESU. See AR A.1 at 5-8 (ER 651). Unlike its predecessor, the 2004 biological opinion also adopted a separate

analytical framework—the "Environmental Baseline Approach"—and an alternative method—the "Listing Conditions Approach"—for resolving whether the proposed action was likely to destroy or modify adversely critical habitat. Id. at 1-10 – 1-11 (ER 603-04).

Those core differences aside, NMFS followed the same five-step analytical process under both biological opinions in making its section 7(a)(2) determination concerning the jeopardy and adverse modification issues. The steps included (1) evaluating the current status of the species at the ESU level with respect to survival-recovery biological requirements and the essential physical and biological features of affected critical habitat; (2) evaluating the relevance of the environmental baseline in the action area to the various ESUs' biological requirements and critical habitat; (3) determining whether the UPA would reduce any ESU's abundance, productivity or distribution or alter critical habitat; (4) evaluating any cumulative effects within the action area; and (5) determining whether the UPA's effects, taken together with the cumulative effects and added to the environmental baseline, would reduce appreciably the likelihood of both survival and recovery or adversely modify critical habitat. Compare AR A.1 at 1-5 – 1-6 (ER 598-99), with AR B.156 at 1-8 – 1-9 (ER 601-02).

a. Jeopardy Analysis

A central principle underlying NMFS' assessment of the environmental baseline's "relevance" to the continued survival and ultimate recovery of the 12 ESUs is the fact that many of the effects contained within the baseline relate to activities which preceded the ESA's adoption and which the Corps and BOR have no practical ability or legal discretion to control. E.g., AR A.1 at 5-5 (ER 648) ("it is clear that the dams already exist[], and their existence is beyond the scope of the present discretion of the Corps or [BOR] to reverse"); id. ("[s]imilarly to their lack of authority to significantly modify structures, the Corps and [BOR] do not have the discretion to abandon some operations"). Nevertheless, NMFS recognized that the environmental baseline contains effects of the FCRPS and BOR project operations that the agencies have discretion to control. Id. ("many aspects of the management of river flow at the dams are within the Action Agencies' scope of discretion"). The distinction between these categories of effects was important in NMFS' view because the *continuing* effects attributable to nondiscretionary features of the facilities' operation should not be deemed part of the proposed action. Id. The difficulty faced by NMFS was distinguishing between the effects in the environmental baseline deriving from activities over which the Action Agencies have no effective control—like the dams' simple existence—and those over which they

possess discretion to control. Id. ("[a]lthough a jeopardy analysis calls for distinguishing the effects of the existence and non-nondiscretionary operations of the FCRPS dams and [BOR] projects from the effects of the proposed action, it is beyond [NMFS'] and the Action Agencies' technical ability to do so with analytic precision").[4]

To account for the presence of substantial effects from non-discretionary features of FCRPS and BOR facilities in the environmental baseline, NMFS fashioned a surrogate measure, denominated the "reference operation," as a means for estimating the effects attributable to operations over which the Action Agencies possessed discretion. AR A.1 at 5-6 (ER 649). The reference operation, as NMFS explained, "theoretically helps determine the least amount of adverse effect to fish that could be achieved given the existing structures." Id. The agency accordingly developed a set of operational protocols, based on existing facility structures, that "maximize[d] fish benefits (one that does not acknowledge other statutory purposes—e.g., navigation, flood control,

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[4] NMFS, however, did discuss at length the nature of the impact from the nondiscretionary features of the FCRPS. See AR A.1 at 5-18 – 5-32 (ER 661-75). It found generally that "[t]he direct effects of the construction of the FCRPS on salmon and steelhead in the Columbia basin can be divided into four categories: blockage of habitat; alteration of habitat; barrier to, or modification of, juvenile migration; and barrier to, or modification of, adult migration" and that these effects have been "especially adverse" to those species. Id. at 5-19 (ER 662); see id. at 5-30 (Table 5.1) (ER 673) (estimating differences between juvenile in-river survival with and without dams).

irrigation and power)"—and thereby intentionally "overestimate[d] the beneficial effects that the FCRPS can actually achieve." Id.; see id. at 5-9 (ER 652) (describing "key operational elements"); Id., App. D at D-11 – 25 (ER 1004-1018) (comprehensive description). NMFS then undertook detailed analysis to determine the effect of the reference operation on nine ESUs during the 1994-2003 period. Id., App. D. Results from that analysis, lastly, were compared in the fifth step in the framework procedure under a "gap analysis" with results from a similar examination of the UPA. Id., App. D at D-25 – 115 (ER 1018-1108). In sum, the reference operation embodies a highly, and in reality an overly conservative construct for purposes of the evaluation required under the fifth step of jeopardy framework.

With regard to the gap analysis itself, the relevant components of the reference operation and the proposed hydro operations are compared by facility in Table D.7 of Appendix D. AR A.1, App. D at D-22 (ER 1015). NMFS more generally summarized the major distinctions as "seasonal differences in flow through the Snake and lower Columbia rivers, differences in spill at FCRPS mainstem dams, and a change in the John Day reservoir elevation." Id. at 6-9 (ER 755). The flow differences are most significant during the summer, when the proposed operations provide 20 percent lower flows (id. at 6-10 (ER 756); see also id., App. D at D-18 (Table D.4) (ER 1011)); the spill differences are

greatest during the spring migration cycle at Little Goose, McNary, and John Day dams (id. at 6-16 (ER 762)); and the John Day reservoir operating pool increase of five to seven feet will increase to water-particle travel time (id. at 6-15 (ER 761)).

Unlike the reference operation which remains constant as of its 2004 status, the UPA provides for the introduction of new mitigation measures throughout its ten-year length, and NMFS therefore estimated the effects of these differences under 2004, 2010, and 2014 operational scenarios against the backdrop of the 1994-2003 study period. Id., App. D at D-73 – D-100 (ER 1066-93). No reduction in adult fish passage survival was identified. Id. at 6-19 – 6-24 (ER. 765-770) Reductions in survival of migrating juveniles in some ESUs were anticipated under the proposed action in its 2004 and 2010 configurations, but the proposed action's 2014 configuration was estimated "to either reduce or close the survival gaps" for all ESUs. Id. at 6-19 (ER 765); see also id., App. D at D-101 – D-115 (Figures D.1-D.15) (ER 1067-1081). The UPA additionally contained non-hydro mitigation measures that were expected to improve survival as to certain ESUs. Id. at 6-57 – 6-140 (ER 803-886). NMFS concluded that, while there would be a short-term reduction in numbers, reproduction or distribution of seven or eight ESUs, the reduction would not persist past 2010 and that the net effects of the UPA would not reduce

appreciably the likelihood of any ESU's survival and recovery. E.g., id. at 6-69 – 6-75 (Table 6.11) (ER 815-821); id. at 8-4 (Table 8.1) (ER 906).

b. Adverse Modification Analysis

Only three of the listed 12 ESUs—Snake River spring/summer Chinook, Snake River fall Chinook, and Snake River sockeye—currently have designated critical habitat. AR A.1 at 2-3 (ER 609). NMFS concluded generally under the "Environmental Baseline Approach" that the spill-rate differences between the UPA and the reference operation would affect juvenile "safe passage" of those ESUs adversely during the 2004-2009 period and, conceivably, during the entirety of the 2004 biological opinion's duration for the latter two. Id. at 6-61(ER 807), 6-76 – 6-77 (ER 822-23), 6-84 – 6-85 (ER 830-31), 6-89 – 6-90 (ER 835-836), 6-133 – 6-134 (ER 879-80), 6-136 – 6-137 (ER 881-882). No adverse modification was found with respect to the migration corridors of returning adults in the ESUs. Id. at 6-61 (ER 807), 6-84 (ER 830), 6-134 (ER 879). It further concluded under the "Listing Conditions Approach" that the proposed action had no negative effect. Id. NMFS nevertheless determined that the proposed action was not likely to diminish appreciably "the value of critical habitat for survival or recovery." Id. at 8-3 (ER 905); see also id. at 8-7 – 8-8 (ER 909-910), 8-12 – 8-14 (ER 914-16), 8-35 – 8-36 (ER 937-938). In making the appreciable reduction determination, the agency weighed various

factors, including "the magnitude and duration of the alteration, the condition of the critical habitat in the action area under the environmental baseline[,] . . . the likely purpose of the affected essential feature for survival and recovery . . . and the amount of uncertainty presented by available scientific data and analysis." Id. at 8-3 (ER 905).

B. Summary Judgment Ruling

The district court's summary judgment identified three legal flaws in the 2004 biological opinion's jeopardy analysis. It further found the no-adverse-modification determination unsupported by the administrative record.

With respect to the jeopardy analysis, the court first held that the biological opinion improperly separated out from the "effects of the action" those associated with allegedly nondiscretionary functions. It reasoned that the Action Agencies have "meaningful discretion to operate the DAMS in a manner that complies with the ESA." CR 986 at 18 (ER 341); see also id. at 21 (ER 344) ("[t]he action agencies have considerable discretion in their administration of the system, allowing them to meet their mandates and yet adjust operations to fulfill multiple purposes, even though there may be some conflict among the purposes"). The court added that accepting NMFS' construction of 50 C.F.R. § 402.03—which excepts nondiscretionary obligations from the section 7(a)(2) consultation duty—would create an unauthorized exemption under a statute that

provides only the Endangered Species Committee as the remedy when an agency is left "with insufficient discretion to avoid jeopardizing a listed species" (CR 986 at 22 (ER 345)) and would allow the agency to "limit the consultation to only part of the action" (id. at 23 (ER 346)).

The district court next concluded that NMFS improperly failed to aggregate impacts from the "effects of the action," the environmental baseline and cumulative effects in determining whether the proposed action would jeopardize a listed species. In so holding, the court rejected NMFS' construction of the "effects of the action" definition in 50 C.F.R. § 402.02 and its argument that an "aggregation" approach would preclude any mitigation unless it was adequate to negate the adverse consequences of the environmental baseline and cumulative effects. CR 986 at 25-26 (ER 348-49). The court reasoned that, where a proposed action is entirely benign, no consultation would be required and hence no jeopardy analysis would occur. Id. at 26 (ER 349). Returning in effect to the discretionary-nondiscretionary action issue, the court characterized the biological opinion as "compar[ing] the proposed action to the share of the proposed action it chose to re-characterize as part of the environmental baseline, rather than properly evaluating the proposed action in its entirety." Id.; see also id. at 28 (ER 352) ("NOAA's comparative approach improperly circumscribes the effects of the action by basing the jeopardy

decision on NOAA's estimate of the impacts attributable only to 'discretionary' elements of the proposed action").

The final flaw in the jeopardy analysis identified by the district court involved extending this Court's decision in Gifford Pinchot Task Force v. USFWS, 378 F.3d 1059 (9th Cir. 2004), from the adverse modification-determination process to the jeopardy-determination process. CR 986 at 34-35 (ER 357-58). It thus became the first federal court to hold that section 7(a)(2) requires NMFS and FWS to consider independently whether a proposed action will effect jeopardy—*i.e.*, section 7(a)(2) requires separate findings concerning the likelihood of survival and the likelihood of recovery. It faulted the biological opinion for "focus[ing] almost exclusively on the question to what extent a proposed action, compared to the reference operation, will reduce the reproduction, numbers, or distribution of a listed species." CR 986 at 34 (ER 357). In the court's view, "[b]oth regulation § 402.02 and NOAA's own Consultation Handbook require that listed species be protected from any appreciable reduction in their likelihood of recovery." CR 986 at 35 (ER 358).

As to the no-adverse-modification finding, the district court criticized NMFS' "optimism that long-term improvements in critical habitat will offset the degradation of the habitat necessary for survival or recovery in the first five years of the 2004BiOp is unrealistic." CR 986 at 33 (ER 356). "NOAA," it

held, "(1) did not analyze the short-term negative effects of the proposed action in the context of the species' life cycles and migration patterns, (2) relied on uncertain long-term improvements to critical habitat to offset the short-term degradation of critical habitat that will occur as a result of the proposed action, and (3) determined that the species' critical habitat was sufficient for purposes of recovery even though NOAA did not have the information on in-river survival rates to make that determination." Id. at 33-34 (ER 357-58).[5]

II. PRELIMINARY INJUNCTION ORDER

Critical to the district court's issuance of the preliminary injunction was its conclusion that "[u]nder the ESA, once a plaintiff has succeeded on the merits, injunctive relief depends on a balance of harm to the listed species and the public interest." CR 1015 at 5 (ER 564). As for the scope of permissible relief, it stated that "a party is entitled to an injunction when one is 'necessary to effectuate the congressional purpose behind the statute.'" Id. The court accordingly did not distinguish between mandatory and prohibitory injunctions.

With respect to the injunctive relief requested against BOR and the Corps, the district court first held that the Corps' ROD and BOR's Decision

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[5] The district court rejected a different set of challenges to the biological opinion raised by two groups of irrigators in a second case that had been consolidated with the NWF-initiated litigation. CR 986 at 36-43 (ER 359-66). Those challenges played no role in the preliminary injunction determination and are outside the scope of this appeal.

Document—which in relevant part adopted the UPA analyzed in the 2004 biological opinion—were arbitrary and capricious because they "reveal that the[] agencies embraced the same fundamental legal flaws that NOAA attempted to use to justify its circumscription of the action subjected to jeopardy analysis." CR 1015 at 6 (ER 565). "[I]n substance," therefore, the Action Agencies "relied on the no-jeopardy finding of the 2004BiOp without an independent rational basis for doing so" (id.) and "failed in their continuing independent duties to ensure that their actions will avoid jeopardy" (id. at 7 (ER 566)).

The district court turned then to the question of harm. It observed initially that the summary judgment ruling held "that adverse impacts to the listed species cannot be insulated from the basis of NOAA's jeopardy analysis simply because they are deemed attributable to the existence and nondiscretionary operations of the dams." CR 1015 at 8 (ER 567). The court then set out the following grounds for its conclusion that "[a]s currently operated, . . . the DAMS strongly contribute to the endangerment of the listed species and irreparable injury will result if changes are not made" (id.):

- The 2004 biological opinion was "substantially procedurally flawed" and accordingly could provide "'no assurance that a violation of the ESA's substantive provisions will not result.'" Id.

- "Ample evidence in the record . . . indicates that operation of the DAMS causes a substantial level of mortality to migrating juvenile salmon and steelhead." Id.

- Unlike the 2000 biological opinion's RPA which "targeted spill during summer months at a level minimally necessary to allow for a meaningful in-river migration program against which the summer transportation program would be compared" (id. at 8-9), the 2004 biological opinion specified no summer spill for the four collector dams. Summer spill additionally would preserve "a semblance of the spread-the-risk considerations NOAA contends govern the spring migration program." Id. at 9 (ER 568).

The court therefore directed the Corps to institute 24-hour spill at the four lower Snake hydroelectric facilities, including the three collector dams, for the June 20-August 31, 2005 period for flows in excess of station service needs and at McNary Dam for the July 1-August 31, 2005 period as to flows in excess of 50,000 cfs—that facility's station service requirement. Id. at 10-11 (ER 569-70).[6]

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[6] The district court denied NWF's request that the Action Agencies be directed during the 2005 summer season to reduce water particle travel time by ten percent between the head of Lower Granite Reservoir and Ice Harbor Reservoir and between the confluence of the Columbia and Snake Rivers to Bonneville Dam. CR 1015 at 10 (ER 569). It further denied, for the present, NWF's request that the 2000 biological opinion RPA be substituted for the 2004 biological opinion except to the extent the former was inconsistent with the other requested injunctive relief. Id. The court intends to revisit the RPA issue at a status conference set for September 7, 2005.

STANDARDS OF REVIEW

A district court's grant of a preliminary injunctive relief is reviewed for abuse of discretion as a general matter. Walcsak v. EPL Prolong, Inc., 198 F.3d 725, 730 (9th Cir. 1999). Nonetheless, because "'[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law,' . . . [this Court] review[s] the underlying legal issues injunction de novo." Brookfield Communications, Inc. v. West Coast Entm't Corp., 174 F.3d 1036, 1046 (9th Cir. 1999) (citation omitted). The district court's conclusions concerning the validity of the Corps' ROD and BOR's Decision Document are embodied in its ruling on the cross-motions for summary judgment, which presented only questions of law, and thus are subject to *de novo* review. Arakaki v. Hawaii, 314 F.3d 1091, 1094 (9th Cir. 2002); Delta Savings Bank v. United States, 265 F.3d 1017, 1021 (9th Cir. 2001). This Court is governed in its decision-making with respect to the legal predicates for the injunctive relief by the same standards as the district court. Id.

Judicial review of final agency actions taken under the ESA is available through the APA. Bennett v. Spear, 520 U.S. 154, 161-62 (1997). APA-based judicial review is governed by the standards in 5 U.S.C. § 706(2) pursuant to which an agency decision "may [be] set aside [only] if the court determines that action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law' or 'without observance of procedure required by law.'" Env'l Protection Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073, 1078 (9th Cir. 2001). "To determine whether an agency violated the arbitrary and capricious standard, this court must determine whether the agency articulated a rational connection between the facts found and the choice made. . . . The court is not empowered to substitute its judgment for that of the agency." Arizona Cattle Growers' Ass'n v. United States Fish and Wildlife, 273 F.3d 1229, 1236 (9th Cir. 2001). Consequently, "as long as the agency decision was based on a consideration of relevant factors and there is no clear error of judgment, the reviewing court may not overturn the agency's action as arbitrary and capricious." Id. APA-based review, comparable to mandamus, also is available under 5 U.S.C. § 706(1) as to agency actions "unlawfully withheld or unreasonably delayed." This review "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 2373, 2379 (2004) (SUWA).

The ESA additionally authorizes citizen suits in section 11(g)(1)(A), 16 U.S.C. § 1540(g)(1)(A), to address a federal agency's *violation* of ESA but not its failure to administer the statute properly. Bennett, 520 U.S. at 173; see Simpson Timber, 255 F.3d at 1079 (citizen-suit jurisdiction available to challenge agency's failure to ensure that actions authorized by it did not

jeopardize listed species). Suits initiated under § 1540(g)(1)(A) have been held subject to APA-based review standards. See Water Keeper Alliance v. USDOD, 271 F.3d 21, 31 (1st Cir. 2001) (collecting cases, and citing Simpson Timber for proposition that § 706(2)(D) standard applies to claim that agency improperly failed to reinitiate consultation under section 7(a)(2)); Sierra Club v. Glickman, 67 F.3d 90, 97 (5th Cir. 1995) (remanding case to district court to review agency interim guidelines "for compliance with the ESA, both §§ 7 and 9, applying the arbitrary and capricious standard"). The applicability of APA standards where jurisdiction is asserted under § 1540(g)(1) is unclear in this Circuit. Compare Washington Toxics Coalition v. EPA, No. 04-35138 (9th Cir. June 29, 2005) (APA standards did not apply in ESA citizen suit), with Ninilchik Traditional Council v. United States, 227 F.3d 1186, 1193-94 (9th Cir. 2000) (APA standards did apply under comparable right-to-sue provision in the Alaska National Interest Lands Conservation Act).

SUMMARY OF ARGUMENT

I. These appeals can, and should, be resolved on the narrow ground that the district court exceeded its authority under the APA and the ESA in overruling NMFS' technical judgment concerning the relative efficacy of summer spill and transportation for the Snake River fall Chinook ESU and in requiring the Corps to provide such spill.

First, NWF's claims and the relief sought are subject to the judicial review limitations in APA § 706because the substantive legal predicates for the injunction—the invalidation of the Corps' ROD and BOR's Decision Document on the basis of the summary judgment ruling—are APA-based. The district court arguably recognized the applicability of those limitations by not relying on the declarations submitted by the parties when it deemed Snake River fall Chinook harmed from the absence of summer spill. The APA-based restrictions, however, should have prevented the court from countermanding NMFS' science-based determination concerning relative merits of spill and transportation for the fall Chinook where, as here, good-faith technical dispute exists over the most appropriate protocols for species' protection. The court also gave no persuasive justification for failing to defer to NMFS on the spill-transportation issue. It thus (1) factually erred in concluding that summer spill protocols for the four collector dams under the 2000 biological opinion's RPA differed from those under the 2004 biological opinion; (2) improperly substituted its judgment for NMFS' with respect to whether summer 2005 spill would further the Federal Defendants' efforts in studying the effects of the long-standing juvenile transportation program; and (3) inappropriately relied on its assessment of the FCRPS' overall impact on the listed ESUs and dissatisfaction with the 2004 biological opinion's jeopardy analysis as a basis for the

injunction, since such generalized concerns bear no relationship to the adequacy of NMFS' conclusion that summer spill has not been established as providing greater biological benefits than transportation to Snake River fall Chinook.

Second, the mandamus-like restrictions in APA § 706(1) govern the propriety of the mandatory relief entered by the district court. As construed by the Supreme Court in SUWA, § 706(1) permits a court only to require federal officials to carry out a final agency action that is compelled specifically by statute. The district court thus was authorized to direct the Corps to discharge its consultation duty under ESA section 7(a)(2). It was not authorized, in contrast, to dictate to the agency how the FCRPS should be operated. NWF has cited no authority that either reached or even supports a contrary conclusion.

II. The district court erred in holding that the 2004 biological opinion did not comply with ESA section 7(a)(2). First, and foremost, it erred in accepting NWF's position that the jeopardy determination must be made with reference to the *combination* of the "effects of the [proposed] action," the "environmental baseline" and any relevant "cumulative effects." Under this approach, an agency action that does not appreciably reduce the likelihood of survival can be foreclosed because it fails to compensate for a harm caused by the environmental baseline or cumulative effects. Although NWF chiefly relies on the Services' joint consultation regulations and handbook for its theory, those

agency documents counsel precisely the result that is reached through a straightforward reading of section 7(a)(2) itself: Whether an agency action will jeopardize a listed species must be determined on the basis of the *proposed action's* effects and not with reference to the combination of its effects and impacts properly included within the environmental baseline or as part of cumulative effects. NWF's contrary construction of section 7(a)(2) has the pernicious result of not only foreclosing implementation of agency actions that do not appreciably reduce the likelihood of both survival and recovery but also precluding agencies from incrementally addressing over time a jeopardy situation caused by impacts within the environmental baseline.

Second, the district court erred in crediting NWF's "disaggregation" claim that NMFS failed to analyze the whole agency action by distinguishing between "discretionary" and "nondiscretionary" activities. The Action Agencies, not NMFS, were responsible for identifying the proposed action, and NMFS meticulously assessed it in the biological opinion. NWF's real complaint instead lies with the allocation by NMFS to the environmental baseline of impacts from "nondiscretionary" activities. No justiciable controversy exists over this issue, however, because the sole non-*de minimis* "nondiscretionary" activity-related impacts included in the environmental baseline were those associated with the dams' construction and continued

physical presence—impacts that NWF itself conceded are properly part of the baseline. NWF's concession on this issue comports with the fact that the dams' construction and continuing physical presence on the rivers are not "interrelated" or "interdependent" actions with reference to the UPA, since the dams do not exist "but for" the agency action and thereby fall outside the scope of the "effects of the action" definition. In short, if NWF believes that the Action Agencies failed to consult over some aspect of their FCRPS-related operations, the appropriate remedy is to identify the non-consulted action and to demand consultation, not to sue NMFS concerning the 2004 biological opinion.

Third, the district court erred in finding NMFS' critical habitat analysis arbitrary or capricious. Contrary to the court's determination, the agency carefully considered the life history and migration patterns of the three affected ESUs in making its no-adverse-modification finding; properly relied on the UPA with respect to assuming the future installation of fish-passage improvements; and answered the question posed by section 7(a)(2); *i.e.*, whether the proposed action would affect critical habitat in a sufficiently negative manner so as to reduce appreciably the likelihood of survival or recovery.

Finally, Idaho adopts the arguments of the Federal Appellants with respect to the need to analyze recovery separately when making the section 7(a)(2) jeopardy determination.

ARGUMENT

The issue before this Court is the propriety of the preliminary injunction entered on June 10. Nevertheless, no question exists that a fundamental predicate for injunction was the district court's summary judgment ruling issued 15 days earlier which found the 2004 biological opinion's jeopardy and adverse-modification analysis flawed. This ruling provided the basis for invalidating the Action Agencies' decisions that adopted the UPA approved in the biological opinion. Reversal of the summary judgment decision thus would require vacating the injunction. As discussed in Part II below, the district court did err in granting summary judgment to NWF and Oregon with respect to their section 7(a)(2) claims against NMFS.

The preliminary injunction, however, was entered improperly without reference to whether the district court correctly granted summary judgment against NMFS. As explained in Part I below, the court not only misapplied APA § 706(2)(A)'s arbitrary, capricious standard in second-guessing NMFS' conclusion that the summer spill at the four collector dams is not critical to the survival of the Snake River fall Chinook ESU but also imposed mandatory

relief not authorized under APA § 706(1). The injunction can and should be vacated on these more narrow grounds without addressing the biological opinion's validity.

I. THE DISTRICT COURT EXCEEDED THE LIMITED SCOPE OF ITS REMEDIAL AUTHORITY UNDER THE APA AND THE ESA BY SUBSTITUTING ITS JUDGMENT FOR NMFS' DETERMINATION AS TO A MATTER OF SUBSTANTIAL SCIENTIFIC DISPUTE AND BY ISSUING MANDATORY RELIEF NOT OTHERWISE APPROPRIATE UNDER APA § 706(1).

A. The District Court Improperly Substituted Its Judgment For NMFS' Science-Based Determinations

Although the parties submitted myriad declarations in connection with NWF's injunction motion, the district court made no findings in its injunction opinion and order based upon them. Indeed, the court made *no* reference to the declarations, relying instead only on the administrative record—and chiefly statements in the 2000 and 2004 biological opinions—for its "harm" finding.[7] It consequently did not resolve or even allude to the complex technical issues raised by the extra-administrative record submissions over the relative efficacy of in-river migration versus barge or truck transportation in low-flow conditions

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[7] The district court observed, for example, that pages 36 and 37 of NWF's reply memorandum in support of the injunction request (CR 968) cited "some" of the "[a]mple evidence in the record" indicating that the dams' operation results in mortality to migrating juveniles. CR 1015 at 8 (ER 567). The analysis in the NWF reply memorandum on those pages, insofar as it was relevant to the mortality issue, relied on quotations from the 2004 biological opinion and the Corps' ROD.

as anticipated for summer 2005. Compare, e.g., BPACG's Emergency Motion under Circuit Rule 27-3 for Stay Pending Appeal at 23 n.16, with Pls.-Appellees' Br. in Opp'n to Emergency Motions for Stay Pending Appeal (Pls.-Appellees' Stay Opp'n) at 3-5.

The district court's non-reliance on the extra-administrative record declarations likely reflected its understanding that the proceeding below is governed by APA judicial review standards even to the extent an ESA citizen-suit claim may have been advanced. The Fifth Circuit thus has held in a citizen-suit context that a district court erred by applying a *de novo* standard of review to a timber management plan submitted by the United States Forest Service in litigation over whether its management practices violated ESA section 9. Sierra Club v. Glickman, 67 F.3d at 96-97. The court of appeals reasoned:

> The ESA permits judicial review of agency action but does not establish the standard to be applied in conducting such review. . . . When a statute authorizes judicial review of agency action without providing standards for that review, we look to the APA. . . . Thus, the appropriate standard of review of agency action under the ESA, including § 9, is whether the action was arbitrary or capricious.

Id. at 96 (citations omitted). This Court reached the same conclusion in Ninilchik Traditional Council that involved a suit under the private right of action provision in the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3117. It reasoned that 5 U.S.C. § 559—which provides that a

"[s]ubsequent statute may not be held to supersede or modify [the APA] . . . except to the extent that it does so expressly"—"leaves us to conclude that challenges to agency actions are subject to the APA's judicial review standard unless Congress *specifies* a contrary intent." 227 F.3d at 1193 (emphasis supplied).

Although the recent Washington Toxics decision appears to conflict with Ninilchik's construction of the APA, that statute's judicial review standards nevertheless should govern presently. This case differs from Washington Toxics because. there the suit's purpose was to require consultation over the registration of pesticides that might affect adversely salmon habitat—consultation that the Environmental Protection Agency argued was not required and had not engaged in. No direct nexus to an APA-based claim existed. Here, in contrast, not only did the Action Agencies consult over the UPA, but the district court also invalidated the Corps' ROD and BOR's Decision Document under the arbitrary, capricious standard because of reliance on the 2004 biological opinion. APA review thus was exercised over the substantive underpinnings of the injunction, and it follows logically that any relief must comply with the law's standards.[8]

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[8] Even were this Court to find Washington Toxics indistinguishable, the decision conflicts with Ninilchik which arose under a private-right-action

When APA standards are applied, the proper outcome here is plain. The very fact that the parties' declarants, all of whom claimed expertise in matters related to the survival of juvenile Snake River fall Chinook migrants, disagreed over the efficacy of using spill rather than existing transportation protocols merely underscored, for APA-based judicial review purposes, the reasonableness of NMFS' conclusion in the 2004 biological opinion that spill has not been established as superior to transportation for assisting the ESU's summer migration. See AR A.1 at 5-17 – 5-18 (ER 660-61) (observing that Snake River fall Chinook have not been the subject of detailed transportation studies and that studies conducted by NMFS scientists preliminarily "suggest that transportation appeared to neither greatly harm nor help the fish"). As this Court has held repeatedly, deference is owed to the federal agency's conclusion where scientific issues are in good-faith dispute. E.g., Envtl. Defense Ctr., Inc. v. USEPA, 344 F.3d 832, 869 (9th Cir. 2003) ("[w]e treat EPA's decision with great deference because we are reviewing the agency's technical analysis and judgments, based on an evaluation of complex scientific data within the agency's technical expertise"); Mt. Graham Red Squirrel v. Espy, 986 F.2d

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provision entirely comparable to § 1540(g)(1). The appropriate route thus would be for the Court to request expedited *en banc* consideration unless it concludes that the injunction should be vacated on other grounds. See Cummings v. Connell, 316 F.3d 886, 893 (9th Cir. 2003).

1568, 1571 (9th Cir. 1993) ("Review under [the arbitrary, capricious] standard is to be 'searching and careful,' but remains 'narrow,' and a court is not to substitute its judgment for that of the agency. . . . This is especially appropriate where, as here, the challenged decision implicates substantial agency expertise").

None of the rationales offered by the district court for jettisoning the deference requirement is persuasive. First, with respect to the two Snake River fall Chinook-specific justifications, the 2004 biological opinion's approach to summer spill at the four collector dams does not differ from the 2000 biological opinion's corresponding RPA component. AR A.1 at 5-15 – 5-16 (ER 558-559) (reference operation transportation protocols for fall Chinook unchanged from 2000 opinion); id. at 6-78 (ER 824) ("[t]he proposed operation is identical to the reference operation relative to the strategy of maximizing transportation of [fall Chinook] juveniles" with reduced spill only at two lower, non-collector Columbia River dams); id. at App. D-20 (ER 1013) (under both the reference operation and the UPA "[s]pill will not be provided during the summer period at the Snake River collector dams and McNary in order to maximize the number of fish collected and transported"). It also was not for the district court to decide whether altering the summer spill protocols would assist in "evaluation of the summer transportation program." CR 1015 at 9 (ER 568). It instead was,

and remains, the responsibility of NMFS and the Action Agencies, through their expert personnel and typically in consultation with other Columbia River Basin biologists, to frame the studies aimed at exploring the relative impact of in-river migration and transportation on Snake River fall Chinook. See AR A.1 at 6-78 (ER 824) ("[t]he Action Agencies' proposed transport operation is to maximize the collection and transportation of juvenile fall chinook and initiate an evaluation of fall chinook transportation with more favorable in-river passage conditions at Snake River collector projects beginning in 2007/2008").

Second, with respect to the 2004 biological opinion's procedural deficiencies and the negative impact of the dams' operation on the various salmon ESUs generally, the district court offered no explanation why those considerations warranted overriding NMFS' determination that transportation of Snake River fall Chinook during the summer was appropriate. The court, in other words, simply dismissed the agency's technical judgment on one issue because it had broader dissatisfaction with the biological opinion. This conflation of the general with the specific, if accepted as a valid basis for narrowly focused relief of the kind here, gives federal courts the ability to pick and choose among operational components of highly complex actions for the purpose of ordering relief without first establishing that the affected component itself represents an arbitrary or capricious agency determination. In sum, the

district court misapplied the arbitrary, capricious standard in APA § 706(2)(A) by overruling NMFS' science-based conclusion that, at least for the time being, the existing summer transportation policy should be continued at the four collector dams.

B. The District Court Improperly Issued Mandatory Relief

NWF's motion for injunctive relief was predicated on the twin principles that the Corps possessed a legal obligation under the ESA to supply the requested summer spill and that this relief could be ordered by the district court. As such, NWF was seeking, in the words of § 706(1), to "compel agency action unlawfully withheld." That it maintained this claim under the citizen-suit authorization in ESA section 11(g)(1)(A) did not make the standards that govern relief under § 706(1) inapplicable for the reasons discussed above, and in any event this Court has equated ordinary mandamus standards with those imposed under the APA provision. E.g., R.T. Vanderbilt Co. v. Babbitt, 113 F.3d 1061, 1065 (9th Cir.1997) ("mandamus relief and relief under the APA are in essence the same"); Independence Mining Co. v. Babbitt, 105 F.3d 502, 506 (9th Cir. 1997) (applying mandamus standards to relief sought by motion to compel determination by agency under APA); Fallini v. Hodel, 783 F.2d 1343, 1345 (9th Cir. 1986) ("[w]hen the effect of a mandatory injunction is equivalent to the issuance of mandamus it is governed by similar considerations").

Were there doubt on this score, the Supreme Court removed it in SUWA. There, environmental groups sued to require certain actions by the Bureau of Land Management (BLM) under the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701-1782. The majority of a Tenth Circuit panel held that the agency actions were mandated under FLPMA's "nonimpairment" provision, 43 U.S.C. § 1782(a), but the Supreme Court reversed unanimously.

The Court outlined the reach of § 706(1) succinctly:

> As described in the Attorney General's Manual on the APA, a document whose reasoning we have often found persuasive, . . . § 706(1) empowers a court only to compel an agency "to perform a ministerial or nondiscretionary act," or "to take action upon a matter, without directly *how* it shall act."

124 S. Ct. at 2379 (citations omitted). The term "action" was used with its APA final-agency-action meaning so that "broad programmatic attack[s]" are precluded (id. at 2379-80), while the "ministerial or nondiscretionary act" requirement "rules out judicial direction of even discrete agency action that is not demanded by law" (id. at 2380). The latter limitation is significant because, as the Court elaborated through an example, "when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be." Id. Against these stringent standards, the Court had no difficulty rejecting the environmental group's nonimpairment

claim—which sought to require BLM to restrict off-road-vehicle use in certain wild and scenic areas—because "[s]ection 1782(a) is mandatory as to the object to be achieved, but it leaves BLM a great deal of discretion in deciding how to achieve it." 124 S. Ct. at 2380.

So, too, the Action Agencies have a specifically enforceable duty under section 7(a)(2) "to ensure that their actions will avoid jeopardy." CR 1015 at 7 (ER 566). The *manner* in which they satisfy this statutory obligation is left to their discretion. The agencies attempted to satisfy the obligation through adoption of the UPA in the ROD and the Decision Document. That the district court found their attempt legally insufficient nonetheless did not mean that it was empowered to direct the Corps to institute a spill regime for the benefit of Snake River fall Chinook, both because such a regime does not constitute final agency action and because, as this Court reiterated subsequently to SUWA, "§ 706(1) generally only allows the district court to compel an agency to take action, rather than to compel a certain result." Mt. St. Helens Mining & Recovery Limited P'ship, 384 F.3d 721, 728 (9th Cir. 2004). The district court, in short, was authorized under § 706(1) only to direct the Action Agencies to comply with their consultation duty, not to prescribe how the FCRPS should be run.

NWF has cited no apposite ESA authority from this Court that has reached a contrary determination. Thus, in arguing for application of the "ESA injunction standard," it relied on several cases, most prominently Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985), for its expansive vision of the district court's power. Pls.-Appellees' Stay Opp'n at 27-28. Thomas held that, "absent 'unusual circumstances,'" the district court erred in declining to enjoin the proposed action pending compliance with section 7(a)(2). 753 F.2d at 764. The Court reasoned that irreparable injury could be "presumed to flow from a failure properly to evaluate the environmental impact of a major federal action." Id. The injunctive relief required in Thomas was thus prohibitory, not mandatory, in nature and aligned closely to preventing the statutory wrong—*i.e.*, taking "agency action" that may affect a listed species without proper consultation under section 7(a)(2). Nothing in the opinion suggested that a trial court is authorized under any circumstances to assume control of an agency's resources and operational discretion by directing the federal officials to engage in affirmative activities deemed by the court as beneficial to a listed species. The remaining cases from this Court relied upon by NWF did not establish the contrary. Earth Island Inst. v. USFS, 351 F.3d 1291 (9th Cir. 2003) (preliminary injunction barring timber sales until merits of section 7(a)(2) claim resolved); Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1057 (9th Cir.

1994) (permanent injunction against implementation of projects under land resource management plans until section 7(a)(2) consultation occurred with respect to the plans); see also Greenpeace Found. v. Mineta, 122 F. Supp. 2d 1123, 1138 (D. Hawaii 2000) (permanent injunction granted against authorization of lobster fishery where fishery management plan predicated on invalid biological opinion).[9]

NWF's claim that application of ordinary § 706(1) standards would subject ESA-listed species arbitrarily to harm "by an on-going federal action that cannot be halted (even though it can be modified to reduce the risk of harm)" (Pls.-Appellees' Stay Opp'n at 29) ignores the fact that the ESA did not modify the APA and that it is not the district court's function to fashion protocols for the day-to-day operation of federal facilities as to which it has

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[9] The Fifth Circuit's decision in Sierra Club v. Yeutter, 926 F.2d 429 (5th Cir. 1991), which was not cited by NWF, warrants mention. There, the court held that a district court had authority in addressing an ESA section 7 violation to "enjoin the agency from continuing activity that has resulted in past [section 7] violations and, to the extent necessary, may dictate temporarily the actions the agency must take with regard to that activity until the party has submitted to the court an acceptable plan of its own." Id. at 439. The court of appeals' statement in this regard was unaccompanied by a reference to decisional authority or by any analysis. The statement is additionally questionable in light of the later decided SUWA and otherwise inconsistent with the narrow availability of mandamus relief against federal agencies under this Court's precedent. E.g., Independence Mining, 105 F.3d at 508 ("[a]n agency 'ministerial act' for purposes of mandamus relief has been defined as a clear, nondiscretionary agency obligation to take a specific affirmative action, which obligation is positively commanded and 'so plainly prescribed as to be free from doubt'").

neither institutional competence nor specific congressional mandate. NWF further marshals no authority for the proposition that the ability of a court to prohibit particular conduct—*e.g.*, engaging in agency action without compliance with section 7(a)(2)—carries with it the power to prescribe *how* the agency will carry out its non-ESA statutory responsibilities.

Finally, NWF's suggestion, based on United States v. Western Electric Co., 46 F.3d 1198 (D.C. Cir. 1995), that no difference exists between prohibitory and mandatory injunctions (Pls.-Appellees' Stay Opp'n at 29) fails to come to grips with this Court's recognition that they are indeed quite different types of relief (Stanley v. Univ. S. Cal., 13 F.3d 1313, 1320 (9th Cir. 1994)) or the circumstances here, which unlike Western Electric involve federal defendants and application of mandamus standards pursuant to § 706(1). No less unavailing is this Court's decision in Lester v. Parker, 235 F.2d 787 (9th Cir. 1956) (*per curiam*). The Lester majority held that a district court could require a Coast Guard official to issue documents showing that the successful plaintiffs were eligible to be employed as seamen on the ground that the affirmative relief was ancillary to an injunction prohibiting the defendants from interfering with the plaintiffs' employment. Id. at 789. Two distinctions are immediately apparent. Like Western Electric, Lester did not involve an APA-based claim. The spill relief order here also is not "ancillary" to a

prohibitory injunction but the *only* relief ordered. While a plausible argument thus could be made that issuing the documents was essential to the prohibitory injunction's effectiveness, such a claim cannot be made presently, since prohibiting a particular agency action in its entirety bears no resemblance to seizing partial control of the action itself through mandamus-like relief.

II. THE DISTRICT COURT ERRED IN DETERMINING THAT THE 2004 BIOLOGICAL OPINION DID NOT COMPLY WITH SECTION 7(A)(2).

The district court's summary judgment ruling adopted without substantive modification three of principal grounds advanced by NWF in its challenge to the 2004 biological opinion. Given these facts and the simultaneously briefing ordered in this matter, Idaho will refer to NWF's arguments as framed in their summary judgment briefing below. Idaho will not argue separately the fourth ground relied upon by the district court in holding the biological opinion inconsistent with section 7(a)(2)—the applicability of Gifford Pinchot to the survival component of section 7(a)(2) decision-making—but adopts the Federal Appellants' analysis as to that issue.

A. Applicable Regulations And Consultation Handbook Provisions Establish That The Section 7(a)(2) Determination Must Be Directed To The Effects Of The Action Under Consideration

NWF argued below that section 7(a)(2) jeopardy determinations are, or should be, the result of an additive process under which the involved agency

action will be proscribed, absent an acceptable RPA or Endangered Species Committee exemption, if the survival and recovery of a listed species will be jeopardized by the "*combined* effects" of the environmental baseline, cumulative effects, and the effects of the action over which consultation is occurring. Doc. No. 776 (Pls.' Open. S.J. Br.) at 13 (emphasis supplied); accord id. at 24 n.16. It relied heavily on the regulations' definition of "effects of the action" in 50 C.F.R. § 402.02 and the jeopardy-analysis process specified in 50 C.F.R. § 402.14(g)(1)-(3) for the "combined effects" construction. Doc. No. 776 (Pls.' Open. S.J. Br.) at 12. NWF quoted from the Services' joint Consultation Handbook for the same notion. Id. at 12-13. It thus interpreted section 7(a)(2) as requiring not a jeopardy determination as to the effect of the proposed action but a jeopardy determination as to the *overall* impact from all past and present federal and non-federal actions, all future non-federal actions that are reasonably certain to occur, and the proposed action itself.

In truth, the regulations and the Handbook counsel far differently and, like the ESA itself, require NMFS to predicate its determination on whether the action itself will jeopardize the survival and recovery of the species or adversely modify critical habitat. The definition of "effects of the action" is the starting point. It actually defines five separate terms, four of which relate to

effects included within "effects of the action" and a fifth which relates to effects not encompassed within that term:

> [1] "Effects of the action" refers to the direct and [2] indirect effects of an action on the species or critical habitat, together with the effects of other activities that are [3] interrelated or [4] interdependent with that action, that will be added to the [5] environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

50 C.F.R. § 402.02 (bracketed entries added). "Effects of the action" therefore includes "direct," "indirect," "interrelated," and "interdependent" effects. Those effects, in turn, "will be added to the environmental baseline"—*i.e.*, they are incorporated into the environmental baseline for purposes of section 7(a)(2) analysis with respect to *other* federal actions. For purposes of consultation and formulation of the 2004 biological opinion, however, the UPA's "effects" stood apart from the "environmental baseline."

This construction of the term "effects of the action" comports with the commentary accompanying promulgation of the Services' consultation regulations in 1986. 51 Fed. Reg. 19,926 (1986). The commentary stated that

"'[e]ffects of the action' include the direct and indirect effects of the action that is subject to consultation" and that "[e]ffects of the action also include direct and indirect effects of actions that are interrelated or interdependent with the proposal under consideration." Id. at 19,932. It further explained the relationship between the "effects of the action" and the "environmental baseline" in rejecting the suggestion that the baseline include only those previously consulted-upon federal actions deemed reasonably certain to occur, reasoning that "a finding under section 7(a)(2) entails an assessment of the degree of impact that action will have on a listed species" and that, "[o]nce evaluated, that degree of impact is factored into all future section 7 consultations conducted in the area" unless the Service is given notice of the evaluated action's abandonment or reinitiation of consultation takes place. Id.

As the foregoing commentary established, inherent in the definition of "effects of the action" is the principle that a section 7(a)(2) determination is made with reference to whether the *proposed action* will result in jeopardy or adverse modification. This principle was reiterated several paragraphs later in the Services' analysis when responding to comments that the term "cumulative effects" should be defined to include all reasonably foreseeable future federal, state and private actions:

> Section 7 consultation will analyze whether the "effects of the action" on listed species, plus any additional cumulative effects of State and

> private actions which are reasonably certain to occur in the action area, are likely to jeopardize the continued existence of that species. Based on this analysis, the Federal agency determines whether it can proceed without exceeding the jeopardy standard. . . . [¶] Future Federal actions proposed for the same area would have to be separately evaluated under section 7 and could not occur unless they were able, *in their own right*, to avoid jeopardizing the continued existence of the affected species or destroying or adversely modifying critical habitat.

51 Fed. Reg. at 19,933 (emphasis supplied). Each federal action, in other words, must pass the test of ensuring that *its* impact, given then existing conditions, will not run afoul of section 7(a)(2) prohibitions. It is further telling that the consultation regulations direct the responsible Service to "[f]ormulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.14(g)(4).

That "cumulative effects" are considered in determining whether a proposed action complies with section 7(a)(2) does not mean that they are "added" to the "effects of the action" to determine the jeopardy and adverse modification issues. Like the environmental baseline, they contribute to the context in which effects of action under consultation is examined. See 51 Fed. Reg. at 19,932 ("[u]nder § 402.14(g)(3) and (4) of the final rule, the Service will *consider* both the 'effects of the action' subject to consultation and

'cumulative effects' of other activities in determining whether *the action* is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat") (emphasis supplied). There accordingly may be situations in which the effects of a proposed action do not violate section 7(a)(2) even though, as a consequence of future non-federal actions reasonably certain to occur, the continued survival of a species will be jeopardized or critical habitat adversely modified. The question nonetheless always remains whether the proposed action will jeopardize a species or adversely modify critical habitat.

The regulations and the associated commentary thus remove all doubt that an agency is foreclosed somehow from proceeding forward with a proposed action merely because, by virtue of a pernicious environmental baseline, a listed species' survival and recovery is jeopardized or critical habitat has been modified adversely. Any other conclusion would effectively prevent federal agencies from engaging in mitigation efforts aimed at ameliorating baseline conditions and saving a species, since the term "action" expressly includes "actions intended to conserve listed species or their habitat." 50 C.F.R. § 402.02. Such a result makes no policy sense given the very purpose of the ESA, and it makes no statutory sense given the absence of the obligation to engage in formal consultation at all where the action agency and the involved

Service agree that the *proposed action* is not likely to jeopardize a listed species or to modify critical habitat adversely. Id. §§ 402.12(k), 402.13(b); see Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 982 (9th Cir. 1985) (rejecting challenge to habitat conservation plan-related incidental take statement with the observation that "[t]he Service went beyond the statutory requirement and concluded that the Permit, coupled with the Plan, was likely to *enhance* the survival of the Mission Blue butterfly").[10] The regulations' construction of section 7(a)(2) is plainly reasonable and entitled to deference under Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). See Babbitt v. Sweet Home Chapter, 515 U.S. 687, 703 (1995)

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[10] The district court, like NWF, relied on this exception for the apparent proposition that entirely beneficial agency actions can be analyzed without reference to, or added to, the environmental baseline. CR 986 at 26 (ER 349). Its reasoning when carried to its logical conclusion indicates that section 7(a)(2) creates *sub silentio* two types of agency actions: those that are entirely benign and therefore can go forward without reference to whether they overcome the jeopardy that exists by virtue of the environmental baseline, and those that may have both positive and negative impacts on survival even though, on balance, they will enhance the affected species' survival likelihood. This otherwise troubling interpretation of section 7(a)(2) was rejected by another district court in decision issued less than three weeks later. N.W. Envtl. Advocates v. NMFS, No. C04-0666RSM, 2005 WL 1427696, at *10 (W.D. Wash. June 15, 2005) (no-jeopardy determination rational even though environmental baseline did not meet the listed ESU's "biological requirements" in view of NMFS' conclusion "that the restoration component of the project will actually improve the environmental baseline in the estuary, while the channel deepening project itself will have minimal impact").

(extending Chevron deference to Secretary of the Interior's construction of the term "take" in ESA).

The Consultation Handbook is consistent with the Services' regulations on these issues.[11] First, it states that "[t]he environmental baseline is a 'snapshot' of a species' health at a specified point in time" and "does not include the effects of the action under review in the consultation." AR B.251 at 4-22. Second, it recognizes that, as provided in the regulations, no consultation is necessary where all effects are beneficial (id. at 4-25)—a result that cannot be squared with the "additive" theory espoused by NWF. Third, any reliance on the Handbook's reference to "aggregate effects" in discussing what the conclusion of a biological opinion should include (see Doc. No. 764 (Or. Open. S.J. Br.) at 9 (quoting AR B.251 at 4-31)) mistakenly assumes that such term means the sum of all impacts from the environmental baseline, cumulative effects and the effects of the action itself determines whether jeopardy or adverse modification is found, as opposed to simply constituting a short-hand description of the impacts that inform the discrete findings required under section 7(a)(2) with respect to the proposed action's effect.

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[11] Even were there conflict between the Handbook and the regulations, the latter control. Arizona Cattle Growers' Ass'n, 273 F.3d at 1242; cf. Nat'l Wildlife Fed'n v. Babbitt, 128 F. Supp. 3d 1274, 1292 n.16 (E.D. Cal. 2000) ("abrupt reversal" rule does not apply to modifications of procedures specified in ESA Habitat Conservation Plan Handbook).

This reading is made clear several pages later where the Handbook states that, in making the section 7(a)(2) determination, "the action is viewed against the aggregate effects of everything that has led to the species' current status and, for non-Federal activities, those things likely to affect the species in the future." AR B.251 at 4-35. Two paragraphs later it adds the "[i]n the majority of cases, a jeopardy opinion is rendered when the total of the species' status, environmental baseline, effects of the proposed action, and cumulative effects lead to the conclusion that the *proposed action* is likely to jeopardize the continued existence of the entire species, subspecies, or vertebrate population as listed." AR B.251 at 4-36 (italics added).

B. NWF's Concession That The Effects Of The Dams' Construction Are Included Properly In The Environmental Baseline Vitiates Its "Disaggregation" Claim That NMFS Failed To Consider The Entirety Of The Agency Action

NWF has never contested the principle that the action agency is responsible for defining the action subject to consultation and that neither NMFS nor FWS, when serving in its capacity as the section 7(a)(2) consulting agency, has authority to modify the action. The inescapable consequence of this principle is that NMFS does not violate section 7(a)(2) by issuing an opinion directed to such action so long as, for present purposes, it identifies and analyzes all "effects of the action" including interrelated and interdependent

activities. The action agency, in turn, runs afoul of the ESA only if it has taken, or intends to take, an "action" not previously consulted over under section 7(a)(2). NWF pursued neither theory with respect to challenging the discretionary-nondiscretionary dichotomy drawn in the 2004 biological opinion. This tactical choice ultimately pegged its challenge's success to acceptance of the "additive" theory of effects' analysis discussed immediately above.

The prime thrust of NWF's "disaggregation" claim is that NMFS improperly relied upon 50 C.F.R. § 402.03 as a basis for concluding that, since the Action Agencies have no obligation to consult over nondiscretionary activities, effects associated with such activities—here the continuing impact of the dams' construction and physical presence on the rivers—are properly excluded from the "effects of the action." According to NWF, the term "action" in section 7(a)(2) "offer[s] no hint of an exception for nondiscretionary activities that are authorized, funded, and carried out by a federal agency." Doc. No. 850 (Pls.' S.J. Opp'n Br.) at 23. NWF nevertheless conceded that "dam construction . . . should not be part of the action in this consultation" and that "the effects of construction are properly part of the environmental baseline" and not the "effects of the action." Id. at 26 n.21. It thus effectively admitted that, if its "additive" theory is rejected, NMFS correctly assigned a very small portion of the juvenile mortality associated with the FCRPS operations to the

"effects of the action." Compare A.1 at 10-2 (Table 10.1) (ER 946) (estimating mean incidental take of juveniles pursuant to hydro component of UPA to range from one to two percent as of 2014 depending upon ESU), with id. at 10-4 (Table 10.3) (ER 948) (estimating mean total juvenile passage mortality to range between nine and 84 percent as of 2014 depending upon ESU). The difference with respect to returning adults is similarly dramatic, where no incidental take is anticipated with respect to implementation of the UPA but where total estimated FCRPS passage mortality ranges from two to 15.4 percent. Compare id. at 10-3 (Table 10.2) (ER 947), with id. at 10-5 (Table 10.4). (ER 949)

NWF's concession that the continuing effects of the dams' construction are part of the environmental baseline thus rendered academic its "disaggregation" claim. Even were it correct about the theoretical propriety of excluding nondiscretionary *operational* duties imposed on the Corps or BOR by statute, NMFS did not factor the impact of those duties out of the "effects of the action" and into the environmental baseline. AR A.1 at 5-6 (ER 649) ("[a]s a result of developing and modeling an FCRPS reference operation to maximize fish benefits (one that does not acknowledge other statutory purposes - e.g., navigation, flood control, irrigation and power), the reference operation

overestimates the beneficial effects that the FCRPS can actually achieve").[12] NWF cannot claim aggrieved party status for standing purposes on the basis of an abstract legal dispute with no attendant injury in fact. E.g., Cetacean Cmty. v. Bush, 386 F.3d 1169 (9th Cir. 2004) ("[t]o satisfy Article III, a plaintiff 'must show that (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision'").

The "disaggregation" theory has other, no less fatal flaws even without the explicit concession concerning the propriety of allocation the continuing effects of dam construction to the environmental baseline. For the theory to invalidate the biological opinion, NWF was required to establish that NMFS failed to analyze all "effects of the action." The question consequently became whether the activity embodied in the dams' construction and its continuing effects—which are the only activity and effects at issue given NMFS' conservative approach to formulating the reference operation—are interrelated

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[12] The only exception to NMFS' methodology in this regard was recognition of BOR's obligation to deliver irrigation water at six projects. AR A.1 at 5-6 n.3 (ER 649). There is no indication in NWF's briefing below that its "disaggregation" challenge is directed to, much less predicated wholly on, this exception.

or interdependent with the UPA. NWF did not address this question, presumably because it recognized that no "but for" relationship exists between such construction and the UPA. 51 Fed. Reg. at 19,932 ("the 'but for' test should be used to assess whether an activity is interrelated with or interdependent to the proposed action"); AR B.251 (Consultation Handbook) at 4-26 ("the biologist should ask whether another activity in question would occur 'but for' the proposed action under consultation"); accord Sierra Club v. Marsh, 816 F.2d 1376, 1387 (9th Cir. 1987). The construction of the dams took place long before the UPA was developed, and the physical structures created through that construction will remain regardless of the proposed action's implementation.

The only remaining basis for the "disaggregation" theory is a claim that the Corps and BOR violated section 7(a)(2) by failing to consult over some aspect of their operation of the FCRPS. Although NWF alleged in the third supplemental complaint that those agencies "have not obtained a valid, complete § 7(a)(2) consultation for operation of their projects" (Doc. No. 833 at ¶ 84 (ER 51)), nothing in its summary judgment briefing indicated what aspects of the projects' operation have not been consulted upon. Even had it so indicated, the integrity of the 2004 biological opinion would be unaffected.

NWF could secure only to an order directing the Action Agencies to comply with their consultation duty under section 7(a)(2).

C. NMFS' Determination Concerning The Absence Of Appreciable Diminishment In Critical Habitat Embodies A Science-Based Finding Entitled To Deference

The district court rejected NMFS' determination that the critical habitat of Snake River spring/summer Chinook, Snake River fall Chinook and Snake River sockeye would not be adversely modified so as to reduce appreciably the likelihood of survival and recovery. In so holding, the court made no reference to the stringent limitations on its ability to override the agency's largely technical conclusions. Under those limitations, deference to agency technical decision-making is required unless "the agency offer[s] an explanation that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view of the product of agency expertise." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); see also Aluminum Co. v. Administrator, 175 F.3d 1156, 1160-61 (9th Cir. 1999). When these standards are applied against the present record, it is clear that the district court erred.

The court gave several reasons for rejecting NMFS' no-adverse-modification finding. CR 986 at 33-34 (ER 356-57). It reasoned first that the agency failed to "analyze the short-term negative effects of the proposed action

in the context of the species' life cycles and migration patterns." CR 986 at 33 ER 356). NMFS, however, engaged in precisely that inquiry for each ESU:

- With respect to Snake River spring/summer Chinook, the controlling considerations in NMFS' decision-making were the facts that the UPA would produce net benefits by the year five of its implementation and that "[a] significant proportion of the migrating juveniles is transported around most FCRPS dams in order to avoid the baseline passage conditions." AR A.1 at 8-8 (ER 910).
- With respect to Snake River fall Chinook, NMFS explained that "[i]n comparing the proposed action to the reference operation, almost all of the difference in 'safe passage' conditions results from conditions primarily due to reductions in spillway passage that occur between Lower Monumental Dam and the unimpounded river below Bonneville Dam," but "the proportion of the [fall Chinook] population exposed to those conditions" was "very small." Id. at 8-12 (ER 914). NMFS additionally found relevant the fact that the UPA did not affect negatively the "existing ability of the habitat under the environmental baseline to provide safe passage for th[e] ESU" through construction of new spillways. Id. at 8-13 (ER 915).

- With respect to Snake River sockeye, NMFS reasoned that "by the sixth year of this proposed action, the condition of critical habitat in the juvenile migration corridor either would be equivalent to the condition associated with the reference operation or reduced by a small amount, which is not considered 'appreciable,'" and because "the current management strategy for the SR sockeye does not rely for the survival of the species on maintenance of fully optimal conditions in the designated juvenile migration corridor." Id. at 8-36 (ER 938). On the latter point, it stressed the fact that "almost all of the SR sockeye [currently] found within the hydro system are the result of a hatchery program funded entirely by the Action Agencies" and that "[t]he hatchery program is operated at a level sufficient to overcome the small losses resulting from the proposed operations as compared to baseline operations." Id.

These findings reflect careful consideration of each ESU's "life cycles and migration patterns" relative to the short- and long-term impact of the UPA. NMFS' attendant conclusions warrant deference.[13]

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[13] The district court suggested that Pacific Coast Federation of Fisherman's Associations, Inc. v. NMFS, 265 F3d 1028 (9th Cir. 2001) (PCFFA), supported its conclusion that NMFS improperly discounted possible short-term negative effects on critical habitat from the UPA. CR 986 at 32-33 (ER 355-56). The decision is inapposite. The 2004 biological opinion did not rely, as did the opinion challenged in PCFFA, on an assumption, which this Court found

The district court next criticized NMFS for relying on "uncertain long-term improvements—*i.e.*, the assumption that removable spillway weirs (RSWs) will be installed at several dams. CR 986 at 33 (ER 356). The UPA specifically provides for the future installation of RSWs at McNary Dam, Lower Monumental Dam and Little Goose Dam, with the caveat that no survival improvement is anticipated at Little Goose where current spillway survival is 100 percent. AR C.289 at 37-39. It was thus wholly reasonable for NMFS to rely on the anticipated installation of these devices and the associated increase in passage survival at McNary and Lower Monumental in making its adverse-modification determination. If the RSWs are not installed as expected, reinitiation of consultation presumably may occur. See 50 C.F.R. § 416.14(c) (reinitiation of formal consultation required "[i]f the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion").

Finally, the district court chided NMFS for deeming the three ESUs' critical habitat "sufficient for purposes of recovery even though NOAA did not

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unsupported by the record, that short-term impacts need not be considered. Id. at 1037. NMFS instead noted the short-term effects on each ESU and then weighed various ESU-specific factors in concluding that no appreciable reduction would occur. AR A.1 at 8-7 – 8-8 (ER 909-10) (spring/summer Chinook); id. at 8-12 – 8-14 (ER 914-16) (fall Chinook); id. at 8-35 – 8-36 (ER 937-38) (sockeye).

have the information on in-river survival rates to make that determination." CR 986 at 34 (ER 357). Whether existing or future habitat conditions are "sufficient" to effect recovery is not the question posed under section 7(a)(2). The question that NMFS was required to answer was whether the proposed action will destroy or adversely modify critical habitat so as to diminish appreciably the likelihood of a listed species' survival or recovery. The agency consequently is directed by the ESA not to determine whether the proposed action will bring about "conditions in which the species can survive and eventually recover"—since conservation planning is the province of ESA section 7(a)(1)—but to make a discrete finding as to whether the action's effect on critical habitat will reduce appreciably the *existing* likelihood of survival or recovery. Gifford Pinchot, 378 F.3d at 1070. Although NMFS may not have answered the "recovery" question that the district court or NWF deemed important, it did respond to the question actually posed by section 7(a)(2).

CONCLUSION

The district court's preliminary injunction should be vacated.

Respectfully submitted this 30th day of June 2005.

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STATEMENT OF RELATED CASES

Appellant State of Idaho is not aware of any related cases.

Respectfully submitted this 30th day of June 2005.

CLAY R. SMITH

CERTIFICATE OF COMPLIANCE
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